BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEREK R. TATRO	)	
Claimant	)	
VS.	)	
	)	
STERLING DRILLING COMPANY, INC.	)	Docket No. 1,061,484
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CORP.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge Nelsonna Potts Barnes' preliminary hearing Order dated January 31, 2013. Garry L. Howard of Wichita, Kansas, appeared for claimant. John David Jurcyk of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

Claimant asserted injuries to his back and left lower extremity on or about December 4, 2010, and each and every working day with an aggravation on or about June 21, 2012. Judge Barnes found claimant suffered a traumatic work-related accidental injury on December 4, 2010. She ruled that claimant made timely written claim. Judge Barnes ordered respondent to provide a list of three physicians from which claimant could select authorized medical treatment, as well as payment of temporary total disability benefits from June 23, 2012 to October 1, 2012, at the rate of $555 per week.

The record on appeal is the same as that considered by Judge Barnes and consists of the January 8, 2013 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Respondent argues claimant is not entitled to workers compensation benefits because: (1) he did not serve timely written claim and (2) claimant's current medical needs are not causally related to his 2010 accident. Respondent also argues that Judge Barnes ordered temporary total disability benefits in excess of the statutory maximum rate. Claimant maintains Judge Barnes' Order should be affirmed.

The issues include: (1) did claimant file timely written claim; (2) are claimant's current symptoms due to his 2010 accidental injury; and (3) did Judge Barnes exceed her jurisdiction by ordering temporary total disability benefits in excess of the allowable statutory rate?

FINDINGS OF FACT

Respondent drills for oil and gas. Claimant worked for respondent for approximately two years as a chain hand. On December 4, 2010, claimant was lifting a 100 pound gel sack when he heard a pop and immediately felt pain in his mid-lower back. Claimant notified his supervisor, but was unable to return to work due to the pain.

On December 6, 2010, claimant sought treatment on his own from Bill Eastes, D.C. Dr. Eastes noted claimant had localized low back pain without radicular symptoms. Dr. Eastes diagnosed claimant with a moderate sprain/strain and recommended cryotherapy. Claimant returned to work, but was sore and had difficulty walking and moving around.

By December 17, 2010, claimant felt he could no longer continue working. Within the next couple of days, claimant met with Gary Talbet[1] and requested medical treatment:

> A. I talked to Gary Talbet, told him I needed – I needed medical attention, I couldn't, I couldn't proceed to work. And filled out some paperwork[2] and then they sent me on to a doctor of their choice.
>
> Q. Okay. And so when you went in and asked for medical treatment, you were intending to have them pay for your medical treatment?
>
> A. Yes.[3]

On December 20, 2010, respondent's safety supervisor prepared a "WORKERS COMPENSATION - FIRST REPORT OF INJURY OR ILLNESS." Respondent agreed to pay for claimant's visit to Dr. Eastes, as well as to send him to Benjamin Davis, M.D.

Claimant was seen by Dr. Davis on December 28, 2010, with mainly right-sided low back pain which occasionally radiated into his right leg. Claimant's pain was about a 5 on a pain scale (presumably a 0-10 pain scale). Dr. Davis diagnosed a back strain. He prescribed Prednisone, ordered x-rays and recommended stretching, ice and heat.

Claimant returned to Dr. Davis on January 4, 2011, indicating his symptoms were improving. Claimant's pain was about a 1 on the pain scale. Claimant could sit and walk without any pain, but experienced increased pain when bending or lifting. Dr. Davis indicated claimant was doing well and released him to normal duties without restrictions.

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[1] Mr. Talbet's role in this case is not clear from the record, but it appears he had the authority to terminate claimant's employment and tell claimant whether he would receive workers compensation benefits.

[2] If claimant completed paperwork, it was not offered into evidence by either party.

[3] P.H. Trans. at 9-10.

Between January 4, 2011 and April 27, 2012, claimant did not seek medical treatment. He testified his pain would worsen and then improve. Claimant indicated his supervisor and crew accommodated him by not requiring him to lift anything excessively heavy.

Claimant went on his own to see Nizar Kibar, M.D., on April 27, 2012. Claimant complained of back pain and right testicle pain. Dr. Kibar noted "[Claimant] has chronic backaches but he injured it again a couple of weeks ago and it is radiating to his right leg."[4] Claimant testified he did not have a new injury; it was just an aggravation. Dr. Kibar diagnosed claimant with backache.

Claimant continued to work until June 23, 2012, when he went to Pratt Regional Medical Center because he felt his pain precluded work. Claimant complained of left lower back pain radiating to the left lower leg. The report of Wilfred Peltier, PA-C, stated:

> Tailbone pain with no recent injury. Injured L spine area lifting heavy bags last year. Has had pain intermittently since injury. This pain started 0500 yesterday getting out of bed. Moved rig 2 days ago. Difficulty walking today D/T pain.[5]

Mr. Peltier diagnosed claimant with lumbosacral radiculopathy and degenerative disc disease. Mr. Peltier prescribed medication and restricted claimant against heavy lifting and bending or twisting at waist.

That same day, June 23, 2012, claimant completed an Employee's Report of Injury Form.[6] Claimant stated his back was getting continuously worse as the days went on from lifting/scrubbing. Claimant testified that after he notified respondent that he was requesting workers compensation, his new supervisor sent him a text message indicating he needed someone who could be there every day. Claimant understood this to mean that Mr. Meade was no longer going to use him, so claimant talked to Mr. Talbet. Mr. Talbet told claimant that he was fired and would not be getting workers compensation.

Claimant saw George G. Fluter, M.D., on August 28, 2012, at his attorney's request. Claimant reported constant lower back, left buttock and left leg pain. Dr. Fluter diagnosed claimant with a work-related low back injury on or about November, 2010, and each and every working day with an aggravation on or about June 21, 2012. Dr. Fluter provided light duty and postural restrictions and recommended various tests and treatments. In addressing causation, Dr. Fluter stated:

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[4] *Id.*, Cl. Ex. 4 at 2.

[5] *Id.*, Cl. Ex. 6 at 2.

[6] *Id.*, Cl. Ex. 5. Claimant only completed the first three lines of this form; his wife completed the remainder as she knows his condition. *Id.* at 16-18.

> [T]here is a causal/contributory relationship between [claimant's] current condition and the reported work-related injury occurring in November, 2010 and each and every working day with an aggravation on or about 06/21/12.[7]

At the preliminary hearing, claimant testified his pain was not so much in his back, but in the left sciatic nerve, which really bothered him. Claimant testified he has pain from the bottom of his buttocks all the way down to his Achilles tendon.

Regarding written claim, claimant testified:

> Q. Between January 4th of 2011 and the time you hired Mr. Howard to represent you in this matter, did you ever give the insurance company or your employer anything in writing saying that you were asking for workers compensation benefits?
>
> A. I filled out an accident report.
>
> Q. Okay. You filled out the accident report at work?
>
> A. Yes.
>
> Q. Saying what happened to you, correct?
>
> A. Yes.
>
> Q. But you never sent them anything saying I need to go see a doctor or I want some work comp benefits or anything like that?
>
> A. No.[8]

Claimant further testified as follows:

> Q. Here in Exhibit Number 1, ... Is that when you had the [sic] stop working and you went in and had talked to your supervisors about needing to go see a doctor?
>
> A. Yes.
>
> Q. And you expected them to make payment for your medical bills?
>
> A. Yes.

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[7] *Id.*, Cl. Ex. 7 at 4.

[8] *Id.* at 25.

Q. And pay you if you were off of work according to the workers compensation statute?

A. Yes.

Q. And to your knowledge, that's what they were doing was getting the paperwork done to do that?

A. Yes.[9]

PRINCIPLES OF LAW

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The syllabus to *Ours v. Lackey*[10] states:

2. In a workmen's compensation case, the written claim for compensation prescribed by K.S.A.1972 Supp. 44-520a need not take on any particular form so long as it is in fact a claim. In determining whether or not a written claim was in fact served on the respondent the trial court will examine the various writings and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. On the facts related in the opinion the question is, did the employee have in mind compensation for his injury when the various documents were prepared on his behalf, and did he intend by them to ask his employer to pay compensation?

4. The written claim required by K.S.A.1972 Supp. 44-520a to be served upon the employer under the Workmen's Compensation Act need not be signed by or for the claimant. The written claim may be presented in any manner and through any person or agency. The claim may be served upon the employer's duly authorized agent.

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[9] *Id*. at 29-30.

[10] 213 Kan. 72, 515 P.2d 1071, 1073 (1973).

ANALYSIS

Written Claim

Written claim was satisfied. Claimant's Exhibit 1, "WORKERS COMPENSATION - FIRST REPORT OF INJURY OR ILLNESS," indicates a claim number was assigned and notes that the claims administrator is the insurance carrier involved in this claim. The report does not overtly indicate that claimant was requesting or making demand for any sort of workers compensation benefits, but the surrounding facts and circumstances demonstrate that such documentation was created on December 20, 2010, shortly after claimant told Mr. Talbet that he needed medical attention. Respondent sent claimant to get authorized medical treatment shortly thereafter. The parties had compensation in mind; written claim was satisfied.

Much of respondent's argument focuses on claimant's failure to make written claim after his January 4, 2011 visit to Dr. Davis. This Board Member reads K.S.A. 44-520a as requiring written claim within 200 days after the date of accident *or* within 200 days of the last payment of compensation. There is no statutory requirement that claimant do both.

Causation

Whether claimant has diagnoses and needs medical treatment directly attributable to his work-related accident is reviewable based on whether the diagnoses and medical treatment stem from an injury that arose out of and in the course of his employment.[11]

When claimant was evaluated at Pratt Chiropractic on December 6, 2010, he complained of non-radicular low back pain and was diagnosed with a strain.

When claimant was seen by Dr. Davis on December 28, 2010, he was diagnosed with a back strain. There is mention of pain radiating down his right leg, depending on his activity. By January 4, 2011, claimant only reported minimal pain. He had no back tenderness or spasm. His range of motion was full. Straight-leg raise testing was negative. Neurologic examination was within normal limits. Claimant's legs were normal for strength, sensation and deep tendon reflexes. Dr. Davis discharged claimant from treatment without restrictions.

When claimant was seen by Dr. Kibar on April 27, 2012, he reported chronic backaches and having been injured again a couple weeks earlier. Claimant had pain radiating into the right leg.

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[11] *Bonner v. Creekstone Farms Premium Beef,* No. 1,059,138, 2012 WL 6101118 (Kan. WCAB Nov. 1, 2012); *Rome v. Wal-Mart Supercenter*, Nos. 1,051,405 & 1,051,406, 2011 WL 2693260 (Kan. WCAB. June 8, 2011); and *Byrum v. Kindsvater, Inc.*, No. 1,052,356, 2011 WL 2693261 (Kan. WCAB June 24, 2011).

The June 23, 2012 Pratt Regional Medical Center report indicated claimant was injured the year before.[12] Claimant testified that he was not injured when getting out of bed at 5:00 a.m. the prior day, but rather that his pain was from the "work prior."[13] Claimant's low back pain radiated into his *left* lower leg. Claimant reported numbness (likely involving his left leg). Mr. Peltier diagnosed claimant with lumbosacral radiculopathy involving the left leg and issued work restrictions. Thereafter, claimant and his wife completed an "Employer's Report of Injury Form," indicating claimant's back and leg got continuously worse from lifting, scrubbing and working. Claimant testified that his sciatic nerve never bothered him from his original accident and was only bothering him around the time he tried to claim benefits a second time, apparently in June 2012.[14]

Dr. Fluter's report indicated claimant reported that his left leg felt as if it were "on fire" in June 2012 after his back worsened over the course of a few days.[15]

Claimant had new and different symptoms by the time of his June 23, 2012 visit to Pratt Regional Medical Center. There is insufficient evidence to demonstrate that such new and different complaints stem from claimant's December 4, 2010 accidental injury. Based on the present record, this Board Member concludes claimant's current symptoms did not arise out of and in the course of his December 4, 2010 accidental injury.

Claimant may have sustained new injury by accident or repetitive trauma. He testified that his condition worsened due to daily work activities. He testified that around the time of his June 2012 hospital visit, his then-current supervisor was not as accommodating as his prior supervisor in terms of letting him avoid some of the heavier work. Additionally, Dr. Fluter opined claimant sustained more than just a single accident in December 2010, but also work-related injuries each and every working day with an aggravation on or about June 21, 2012.

Dr. Fluter indicated there was a causal/contributory relationship between claimant's work injuries and his current condition. However, Dr. Fluter did not address: (1) the new law's prevailing factor requirement, (2) whether claimant had more than a sole aggravation, acceleration or exacerbation of a preexisting condition or if any new injury by accident or repetitive trauma rendered a preexisting condition symptomatic; or (3) whether the potential repetitive nature of claimant's injury was demonstrated by diagnostic or clinical tests.

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[12] Claimant meant he was injured in 2010. P.H. Trans. at 18.

[13] P.H. Trans. at 16. This statement could mean claimant had pain from moving a rig two days earlier or from his December 4, 2010 accidental injury or perhaps from repetitive work or a combination of these events and activities.

[14] *Id.* at 29.

[15] *Id.*, Cl. Ex. 7 at 2.

In any event, the current record does not support a finding that claimant's current symptoms are due to his December 4, 2010 accidental injury or that claimant proved that he sustained a more current compensable injury by accident or injury by repetitive trauma that might explain his new and different symptoms in mid-2012. As such, this Board Member reverses Judge Barnes' preliminary hearing Order.[16]

CONCLUSIONS

Claimant satisfied written claim for a December 4, 2010 accidental injury. This Board Member finds that claimant's current physical complaints are unrelated to his December 4, 2010 accidental injury. Judge Barnes' preliminary hearing Order is reversed.

These preliminary hearing findings and conclusions are neither final nor binding and may be modified upon a full hearing, pursuant to K.S.A. 44-534a. This preliminary hearing appeal has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member reverses Administrative Law Judge Nelsonna Potts Barnes' preliminary hearing Order dated January 31, 2013.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Nelsonna Potts Barnes

[16] This decision renders moot the issue whether Judge Barnes exceeded her jurisdiction in awarding temporary total disability at a rate higher than prescribed by law for a December 4, 2010 accidental injury.